

Of the eighteen presumably rational people who have had the duty of deciding whether the petitioner should be put to death (12 jurors, the trial judge, and five members of the Indiana Supreme Court), fourteen have determined that the petitioner should not have received the sentence imposed. If the imposition of the death penalty is to be rationally explained and discretion channeled, some standard, other than that of manifest unreasonableness, must be utilized to review those cases where such a difference of opinion exists.

II. The remand by the Indiana Supreme Court for additional factual findings twice placed the petitioner in jeopardy.

The Indiana death penalty statute, I.C. 35-50-2-9 requires that before a judge may impose the death sentence, he or she must find that the State has proved one of nine aggravating circumstances beyond a reasonable doubt and that the statutory aggravating circumstances outweigh any mitigating circumstances which exist. In the trial court's sentencing findings filed on October 2, 1981 (Appendix C), it did not find that the state had proved any one of the statutory aggravating circumstances beyond a reasonable doubt. In addition, the "aggravating" circumstances which it did find to exist were facts which could arguably be considered in mitigation, e.g. that the petitioner was suffering from various types of recognized mental illnesses. While this Court has never directly decided whether a sentence of death premised on such findings would be upheld, it has strongly indicated that it would not, based on due process grounds. Zant v. Stephens, supra.

The petitioner argued that the judge's findings did not support the sentence imposed both in his motion to correct errors filed with the trial court and in his brief on appeal to the Supreme Court of Indiana. After the filing of petitioner's brief with the Indiana Supreme Court, the respondent filed its Verified Petition for Writ of Certiorari to Supplement the Record, admit-

ting that the trial court erred in its findings and asking that the trial judge be ordered to amend those findings to "include the statutory grounds relied upon in imposing the sentence of death." The respondent's petition was granted over petitioner's objections, and the trial court filed its nunc pro tunc entry which is set out in Appendix D.

In Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), this Court held that jeopardy would attach to a jury's verdict at a death penalty sentencing hearing where the sentencing hearing itself had the characteristics of a trial on guilt or innocence. The Indiana death penalty statute, I.C. 35-50-2-9, is similar in all respects but one to the statute involved in Bullington.

Indiana, like Missouri, requires a bifurcated proceeding where the burden is upon the State to prove the existence of one or more previously alleged statutory aggravating circumstances beyond a reasonable doubt. At the sentencing hearing, both parties may introduce evidence in aggravation or mitigation and argue their respective positions to the jury. The jury then retires to deliberate on its verdict, after having been instructed as to the tests set out in I.C. 35-50-2-9. After the filing of a presentence report (I.C. 35-4.1-4-9); the judge makes his decision, based on the same standards that the jury was required to consider." I.C. 35-4.1-4-3 and I.C. 35-4.1-4-5 further provide for the introduction of additional evidence and argument at the sentencing hearing conducted before the court. The main distinction is that, unlike Missouri, Indiana does not make a jury verdict that the death penalty not be imposed binding.

Both Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978) and Green v. Massey, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 held that the Double Jeopardy Clause of the Fifth Amendment would bar a retrial where a conviction is reversed at the appellate level for insufficiency of the evidence.

A similar situation is present in petitioner's case. The findings of fact made by the court as the result of the sentencing "trial" were insufficient to support the sentence imposed. This fact was conceded by the respondent and the Indiana Supreme Court alike. The Indiana Supreme Court's order that the trial court correct its findings was a determination by them that the evidence as found by the lower court was insufficient to support the sentencing "verdict". As jeopardy had attached, however, under this Court's holding in Bullington v. Missouri, supra, permitting a redetermination of the evidence and resentencing twice placed the petitioner in jeopardy in violation of the Fifth Amendment.

In addition, the petitioner was not given an opportunity to present evidence, argument of counsel or in any way be present or participate in the procedure whereby the trial court reweighed and redetermined the evidence pertaining to his sentence. The requirements of the Due Process Clause must be satisfied in the sentencing process as well as the trial itself. Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). That case also recognized the "importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases". Id. at 360, 97 S.Ct. 1197, 51 L.Ed.2d 393, 403.

The remand by the Indiana Supreme Court required nothing less than a complete re-evaluation of the evidence of the entire trial as it related to the sentence to be imposed and a redetermination of that sentence. Petitioner, however, was afforded no opportunity to take part in this critical process which would determine whether he lived or died.

III. The petitioner was twice placed in jeopardy with reference to his sentence for the reason that the Indiana death penalty statute makes the verdict of the jury as to the sentence advisory only.

I.C. 35-50-2-9 (Appendix B) states that the jury, after the

sentencing hearing, shall recommend whether the death penalty shall be imposed. As determined by the Indiana Supreme Court on petitioner's state appeal, the verdict of the jury on sentencing is advisory only and need not be followed by the trial court regardless of whether the verdict is in favor of or against the death penalty.

According to the latest compilation available to petitioner, Indiana is one of only three states of those who permit jury participation in the sentencing phase of capital cases that do not make a jury recommendation of life binding on the trial court. (The others being Florida and Alabama.) Twenty-eight other states make a jury recommendation of life (or more correctly, that the death penalty not be imposed) binding.

Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d (1981), discussed supra, held that due to the trial-like nature of the Missouri capital crime sentencing procedure, jeopardy would attach to a jury's rejection of the death sentence. As pointed out in the preceding section, Indiana's sentencing procedure is virtually identical to that established in Missouri with the exception of the binding effect in Missouri of a jury's recommendation of life.

As expressed in United States v. DiFrancesco, 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980):

"The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." Id. at 127-128, 101 S.Ct. 426, 66 L.Ed.2d 328, 339 (1980).

The Indiana system creates two full-blown trials regarding the sentence to be imposed, one before the jury and one before the

court. If the State fails in its burden of proof in the first before the jury, it is given an unfettered opportunity to try again to meet its burden in its presentation to the trial court. Even assuming the present procedure--that the jury's verdict is advisory only--no defendant charged with a capital offense is going to ignore the potential value of a verdict by twelve citizens in his favor as to the sentence to be imposed. The "embarrassment \* and ordeal, \* \* \* anxiety and insecurity" of the sentencing trial before the jury are certainly as great as the second hearing conducted before the trial judge.

A jury verdict of acquittal, no matter how erroneous, has traditionally been afforded absolute finality. United States v. DiFrancesco, supra; Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978). Under the Indiana procedure utilized in petitioner's case, the State had the burden of proving one or more of the statutory aggravating circumstances beyond a reasonable doubt. Since the jury in Indiana is not required to render written findings, it is impossible to conclusively determine upon what basis they voted to not impose the death penalty in petitioner's case. One possible basis, however, is that the State simply failed to meet its burden. To allow the sentence to be relitigated before the trial judge is to give the State the "second bite of the apple" forbidden by the Double Jeopardy Clause of the Fifth Amendment.

A limited form of "continuing jeopardy" was approved by this Court in Swisher v. Brady, 437 U.S. 204, 98 S.Ct. 2699, 57 L.Ed. 2d 705 (1978). In that case it was held that the Double Jeopardy Clause presented no bar to a review by a juvenile court judge of the findings and recommendations of masters.

The Swisher Court held that the statute there in question did not afford the prosecution a "second crack" at the defendant as the State could not present additional evidence unless the defendant consented. Thus the central purpose of the Double Jeopardy



Clause, to provide the prosecution with another opportunity to supply evidence which it failed to muster initially, was not violated. In Indiana, there is, of necessity, a delay between the return of the jury's verdict on sentencing and the sentencing hearing before the court, to allow for the preparation of the pre-sentence report. Nothing prevents the State from presenting whatever evidence it desires at this second later sentencing hearing.

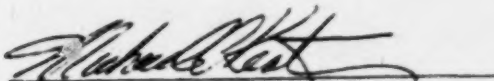
In Swisher it was also held that the juvenile court procedure at issue did not subject a juvenile defendant to the embarrassment, expense and ordeal of a second trial for the defendant was not even present when the court conducted its review of the master's findings. The Indiana death penalty statute, on the other hand, provides for the defendant's presence at the second sentencing hearing before the court. As pointed out above, having once litigated the issue of his sentence, suffered the ordeal and anxiety of the sentencing hearing before the jury, and having prevailed, he must once again rally his strength and make his defense to the same issues presented to the trial court.

This Court has often said that form should not prevail over substance in determining whether a particular procedure violates the Constitutional prohibition against double jeopardy. The sentencing procedure established in Indiana in capital cases has all the same characteristics of a trial as that statute under consideration in Bullington v. Missouri, supra. The sole difference is that Indiana has labeled the jury's verdict a "recommendation". Had the Indiana legislature so labeled the jury's verdict on guilt or innocence, there is no doubt but that it could not stand. Under the authority of Bullington, the same logical conclusion is reached where the issue is not guilt or innocence but whether the defendant should live or die.

#### CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Indiana Supreme Court.

Respectfully submitted,



MICHAEL C. KEATING  
1010 Hulman Bldg.  
Evansville, IN 47708  
Telephone: (812) 424-6671

JOHN D. CLOUSE  
1010 Hulman Bldg.  
Evansville, IN 47708  
Telephone: (812) 424-6671

COUNSEL FOR PETITIONER.